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No. 168

IN THE

Supreme Court of the United States

October Term, 1959

FEDERAL BROADCASTING SYSTEM, INC.,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and WBBF, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR WBBF, INC. IN OPPOSITION

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OPINIONS BELOW

The *per curiam* opinion of the court below (Pet. App. 25-28) is reported at 266 F.2d 922. The decision of the Federal Communications Commission (R. 149-162) is reported at 24 FCC 179 (1958).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the action of the Commission renewing the license of radio station WBBF, Rochester, New York, for the period June 1, 1954 to June 1, 1957, was entered on April 2, 1959 (Pet. App. 24). The petition for a writ of certiorari was filed

July 1, 1959. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether the Commission, pursuant to modified procedures adopted by Congress in 1956 (47 U.S.C. Sec. 309(c)), permitting that agency to dismiss a protest without an evidentiary hearing where it concludes, after oral argument, that the allegations in the protest (even if proved) would not invalidate the challenged grant, properly rejected petitioner's pleading protesting a renewal of station WBBF's license.

STATUTES INVOLVED

Section 325(a) of the Communications Act of 1934, as amended (47 U.S.C. Sec. 325(a)), is set out at pages 3-4 of the petition. The pertinent protest provisions of that Act (47 U.S.C. Sec. 309(c)) are set out in the Government's brief in opposition.

STATEMENT

Stated chronologically, the following background facts are pertinent to the instant petition to review the judgment of the court below, affirming action taken by the Commission (following an earlier remand) dismissing after oral argument petitioner's pleading protesting the renewal of station WBBF's license for the period June 1, 1954 to June 1, 1957:

Section 325(a) of the Communications Act of 1934 (47 U.S.C. Sec. 325(a)) provides that no station shall "rebroadcast the program or any part thereof of another broadcasting station without the *express* authority of the *originating* station."[1] In 1950 (pursuant to 47 U.S.C. Sec. 303(r)), the Commission instituted rule-making proceed-

[1] Emphasis supplied throughout this brief.

ings with a view to adopting regulations designed to clarify the term "originating station" and the conditions under which a station could properly refuse to grant "rebroadcast" privileges. After carefully studying the legislative history of Section 325 (J.A. 38-41)[1] and comments filed by interested persons, the Commission held that the station whose signal was "picked up" by another station for rebroadcast purposes was the "originating station" (J.A. 39, 45). Although of the opinion that arbitrary and unreasonable refusals by the "originating station" of requests by other stations to "rebroadcast" *particular* programs might constitute conduct affecting a licensee's qualifications, the Commission concluded that in many if not most instances a denial of rebroadcast privileges would be fully justified, that blanket requests addressed to the originating station for rebroadcast privileges could not be used to appropriate the property rights of others in particular programs, and that refusals to permit "rebroadcasts" would have to be considered "on a case-to-case basis . . . in the context of *all the facts* surrounding any particular controversy". J.A. 48; *Amendment of Rebroadcasting Rules*, 1 Pike & Fischer, *Radio Regulation*, Pt. III, p. 91:1136 (1952); 9 Pike & Fischer, *Radio Regulation*, 350, 352 (1953).

Gordon P. Brown, general manager of station WSAY, Rochester, N. Y., and petitioner's sole stockholder, actively participated in that proceeding (J.A. 38, 45; 9 Pike & Fischer, *Radio Regulation*, 350). Though the Commission's Opinions and Orders of October 29, 1952 and May 13, 1953 in that proceeding rejected his views regarding the scope and purpose of 47 U.S.C. Sec. 325(a), neither he nor petitioner took any appeal therefrom.

[1] The instant litigation was before the court below once previously. Since the records and printed joint appendices used in the two appeals were not consecutively paginated, the record on the first appeal will be here cited as "J.A." and on the second appeal as "R."

Shortly thereafter respondent filed an application (see J.A. 1) to acquire 100% of the stock of WARC, Inc. (now WBBF, Inc.). Petitioner seized upon this application as a vehicle by which to reargue Mr. Brown's "rebroadcast" contentions, asserting that the sellers of station WARC (now station WBBF) had refused to grant blanket rebroadcast privileges sought by station WSAY licensed to petitioner (J.A. 1-37). The Commission notwithstanding these objections granted its consent to the transfer on August 26, 1953 (J.A. 23), which the purchasers consummated the next day (see J.A. 55). A petition for reconsideration of the aforesaid transfer was denied by the Commission on May 20, 1954 (see J.A. 104-105). Petitioner took no appeal therefrom.

However, by separate action, likewise taken on May 20, 1954, the Commission renewed WBBF's license for the three-year period ending June 1, 1957 (see J.A. 105). Petitioner protested that grant in a pleading filed June 18, 1954, contending (so far as here pertinent) that its blanket requests for rebroadcast authority had been turned down by WBBF (J.A. 67-103). In a response to that pleading it was pointed out that all the requests for rebroadcast authority (as borne out by the attachments to the protest) had been addressed to the former owners of WBBF and that the protest contained no assertion (since it was not *then* the fact) that WSAY had ever made a demand on the *new* owners of WBBF for rebroadcast privileges (J.A. 104-109). The Commission denied the protest (and a subsequent petition for reconsideration thereof) on the premise that the pleadings failed to state any public interest considerations with the degree of particularity required by 47 U.S.C. Sec. 309(c) (J.A. 111-130).

On an appeal therefrom (J.A. 131-132), the court below reversed, holding that the questions which petitioner had sought to raise should have been disposed of by the

Commission on their merits. *Federal Broadcasting System* v. *Federal Communications Commission*, 97 U.S. App. D.C. 293, 231 F.2d 246 (1956). However, in remanding the case to the Commission, the Court expressly stated (p. 297) that it should not "be understood as saying that the Commission may not ultimately—for some good reason—be able to justify a denial of the protest *without hearing*." The Court further noted (p. 298) that it was not then passing on the effect, on matters raised in the protest, of intervening legislative changes in 47 U.S.C. Sec. 309(c).

Following that remand and after hearing oral argument on the protest (R. 58-62), the Commission in a Decision released March 14, 1958 (R. 149-162) concluded that the matters raised in the protest, even if proved, would not warrant a denial of WBBF's renewal, that those matters could, therefore, be disposed of "as on demurrer" under the protest statute as amended in 1956, and accordingly reaffirmed its former action granting WBBF a three-year renewal of its license (June 1, 1954-June 1, 1957).[1] From a *per curiam* affirmance of *that* decision by the court below, petitioner now seeks certiorari

ARGUMENT

As brought out in the foregoing Statement, petitioner was twice told by the Commission (at the time of the 1950-1953 rule-making proceeding and again in connection with the transfer of station WBBF to respondent) that a broadcast station need not honor "blanket requests" for rebroadcast privileges, and hence that a denial of requests of that type would not reflect adversely on a licensee's character qualifications. Instead of challenging

[1] Since June 1, 1957, pending a resolution of the instant litigation, Station WBBF has been operating under a temporary license pursuant to Section 1.65 of the Commission's Rules (1 Pike & Fischer, *Radio Regulation* 51:65; cf. 5 USC sec. 1008(b)).

the Commission's Report on Rebroadcasting by a direct appeal, petitioner now attacks collaterally the conclusions there reached—by arguing that the Commission has misconstrued 47 U.S.C. Sec. 325(a), and that WBBF's refusal to entertain blanket requests for rebroadcast privileges adversely reflects on WBBF's character qualifications and "demonstrates unfitness on respondent's part to continue as a licensee" (Pet. 7).

Petitioner's protest was dismissed by the Commission on two grounds: (1) because of the sweeping character of WSAY's request to rebroadcast substantially all programs carried by WBBF; and (2) because the interpretation which petitioner sought to place on 47 U.S.C. Sec. 325(a) was inconsistent with conclusions reached by the Commission in its 1950-1953 rule-making proceeding (R. 149-162). As petitioner recognizes (Pet. 8, 10, 15), the court below affirmed on the first ground, finding it unnecessary to pass on the correctness of the Commission's pronouncements in the earlier rule-making proceeding. Hence, the question of statutory construction pressed in the petition (Pet. 2) need not here be resolved, if the allegations in petitioner's protest did not present matters which (if proved) would demonstrate respondent's unfitness to continue as a licensee (Pet. 7).

Whether the Commission's pronouncements in its earlier rule-making report were right or wrong, they were not so clearly erroneous, made as they were by the agency charged by Congress with the administration of the Communications Act, that adherence by WBBF to the views there expressed by the Commission would besmirch WBBF's character or disqualify WBBF as a broadcast licensee.

Certainly, in line with requirements laid down in its earlier Report, the Commission can insist that a pleading complaining of a station's refusal to accord another station rebroadcast privileges be documented in some detail

—by describing the particular program for which rebroadcast permission was sought, the proposed time of such rebroadcast (whether simultaneous or at a subsequent date), the rights of others in the program in question, etc.[1]

Since petitioner's protest was predicated on a "blanket request" (see J.A. 85), which WBBF turned down in reliance upon the Commission's carefully considered rule-making report (J.A. 96), from which petitioner took no direct appeal, it necessarily follows that, even if the Commission in that report misconstrued the language or intendment of 47 U.S.C. Sec. 325(a), WBBF should not be penalized by having its license renewal denied.

In short, the instant petition presents not a question of the proper construction of the rebroadcast provisions of the Communications Act, but rather a question relating to the sufficiency of particular allegations in a given pleading seeking to impugn the Commission's action renewing the license of a station which has complied with the Commission's pronouncements relating to rebroadcasts and otherwise operated in the public interest.

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[1] Throughout its petition (pp. 2, 3, 4, 7, 10, 11, 14, 16, 17, 18, 19, 20, 22), Federal Broadcasting System assumes that a station has no "proprietary interests" in network-produced shows which it carries. Though not directly in issue, respondent does not acquiesce in that assumption. Under the "territorial exclusivity" provisions of the Commission's network rules, sustained by this Court in *National Broadcasting Company* v. *United States*, 319 U.S. 190, a station has a "first refusal" of the programs of the network with which it is affiliated in the community to which it is licensed. By carrying network shows at a fraction of its card rate, a station *pays* for such "exclusivity" and is, therefore, in a position to object to other stations picking up its signal and rebroadcasting those shows, simultaneously or on a delayed basis, particularly where the stations which are thus reaping where they haven't sown do not share in the original cost of obtaining such programs. That the networks can determine which stations may carry their programs in a given community has been sustained by the courts in litigation to which petitioner was a party. *Federal Broadcasting System* v. *American Broadcasting Co.*, 167 F.2d 349 (C.A. 2, 1948), *cert. den.* 335 U.S. 821.

CONCLUSION

The decision below is correct, no important issue calling for further review by this Court is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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